

Appl. No. 10/764,190
Docket No. 9495
Amdt. dated January 8, 2009
Reply to Office Action mailed on September 8, 2008
Customer No. 27752

REMARKS

Claim Status

Claims 1, 4-12, 17 and 18 are pending in the present application. No additional claims fee is believed to be due.

Claims 2, 3 and 13-16 were canceled without prejudice in a previous response.

All pending claims are amended herein.

Claim 1 is the only independent claim. Support for the amendments to Claim 1 may be found in, *inter alia*, the specification at page 4, lines 30-31 and the drawings at Fig. 4 (shelf); Figs. 4-7 (engagement at first and second spaced apart locations); Figs. 4 and 5 (engagements with restriction of relative movement); Figs. 2, 4, 6 (top support member with horizontally extending portions). Amendments to the remaining dependent claims follow from the amendments to Claim 1 and find support from the same portions of the drawings and specification.

It is believed these changes do not involve any introduction of new matter. Consequently, entry of these changes is believed to be in order and is respectfully requested.

Rejection Under 35 U.S.C. §103(a) Over Niece in view of Harris

Claims 1, 4, 5, 7-9, 11, 12, 17 and 18 stand rejected under 35 U.S.C. §103(a) as being unpatentable over Niece (U.S. Pat. No. 4,023,682) in view of Harris (U.S. Pat. No. 4,143,845). Without conceding the correctness of the rejection or waiving any argument he may have, Applicant has amended the claims. Applicant respectfully submits that the cited references do not support a *prima facie* conclusion of obviousness of the rejected claims.

Under MPEP §2142, the Office bears the burden of factually supporting an asserted *prima facie* conclusion of obviousness. In determining the differences between the cited art and the claims, the question is not whether the differences themselves would have been obvious, but whether the claimed invention as a whole would have been obvious. *See, e.g., Stratoflex, Inc. v. Aeroquip Corp.*, 713 F.2d 1530, 1537; 218 U.S.P.Q.

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871 (Fed. Cir. 1983). If the Office does not demonstrate *prima facie* unpatentability, then without more, the Applicant is entitled to the grant of the patent. *See In re Oetiker*, 977 F.2d 1443, 1445; 24 U.S.P.Q.2d 1443 (Fed. Cir. 1992).

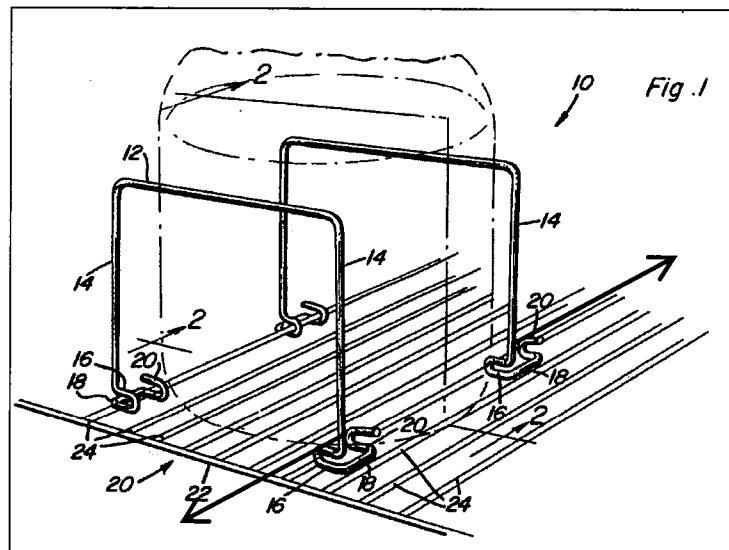
To establish a *prima facie* case of obviousness under 35 U.S.C. §103, the Office must show that all of the claim elements are taught or suggested in the prior art. *See, e.g., CFMT, Inc. v. Yieldup Int'l Corp.*, 349 F.3d 1333, 1342; 68 U.S.P.Q.2d 1940 (Fed. Cir. 2003).

As amended, independent Claim 1 recites a shelf display apparatus for storing packages, said apparatus comprising: a shelf having at least one shelf surface member lying along a substantially horizontal plane; a first vertical support member having a first lower end, wherein said first lower end is engageable with said shelf surface member at a first engagement location, such that movement of said first lower end relative to said shelf surface member in at least one direction is blocked; a second vertical support member having a second lower end, wherein said second lower end is engageable with said shelf surface member at a second engagement location, such that movement of said second lower end relative to said shelf surface member in at least one direction is blocked, said first and second engagement locations being spaced apart from each other along a first line in said horizontal plane, and movement of said first and second lower ends relative to said shelf surface member in a direction perpendicular to said first line is blocked; and a top support member having first and second top support ends, a length therebetween, and a nonlinear portion along the length, said nonlinear portion having a plurality of horizontally extending portions that at least partially extend in one or more horizontal directions away from a second line connecting said first and second top support ends, said first top support end being joined to said first vertical support member and said second top support end being joined to said second vertical support member such that said first vertical support is connected to said second vertical support solely by said top support member, wherein said top support member, said first vertical support member and said second vertical support member together provide structural support for storing packages in a substantially vertical orientation on a shelf. By dependency, all of the remaining dependent claims include all of these elements.

Without waiving any other arguments he may have, Applicant submits that neither Niece nor Harris, alone or in combination, teach or suggest a shelf display apparatus comprising, *inter alia*, a first vertical support member having a first lower end engageable

with a shelf surface member at a first engagement location; a second vertical support member having a second lower end engageable with the shelf surface member at a second engagement location; said first and second engagement locations being spaced apart from each other along a first line in a horizontal plane, and movement of said first and second lower ends relative to said shelf surface member in a direction perpendicular to said first line is blocked; and a top support member connecting the first and second vertical support members, wherein said top support member, said first vertical support member and said second vertical support member together provide structural support for storing packages in a substantially vertical orientation on a shelf.

As can be appreciated from review of the figures of Niece, movement of vertical elements 14 in a direction perpendicular to a line between the respective engagement locations (proximate the reference numerals 16, 18) is not blocked, but would appear to be permitted, as suggested by the large arrows (inserted by Applicant):

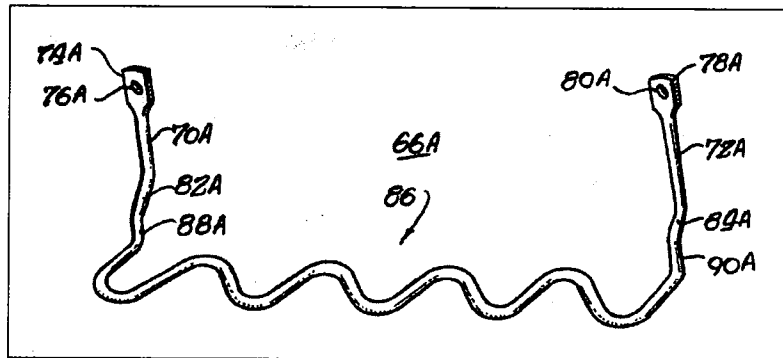


Niece, Fig. 1 (large arrows inserted by Applicant)

Harris does not teach or suggest any vertical support members so engageable with a shelf surface member.

Applicant respectfully submits further that any combination with Harris to attempt to support a *prima facie* conclusion of obviousness of Applicants' claimed invention is

not proper. The Office has cited Harris for its depiction of a “serpentine section” 86 (Harris Fig. 7) as satisfying the top support element of Applicant’s claims:



Harris, Fig. 7

However, the Harris “serpentine section” is not a top support element, nor does it have the other structural relationships recited in Applicant’s claims. It is a bottom support element, forming a horizontal, two-dimensional pattern that serves as two-dimensional horizontal support for articles or a hanging shelf laid thereover. *See Harris at Col. 5, lines 41-45.* As such, it bears no relationship to the problem addressed by Applicants.

It is improper to isolate a portion of the Harris device as described from its remaining components, reconfigure it and assign it different structural relationships and function, so as to make it fall within Applicant’s claims. “It is impermissible within the framework of section 103 to pick and choose from any one reference only so much of it as will support a given position to the exclusion of other parts necessary to the full appreciation of what such reference fairly suggests to one skilled in the art.” *Bausch & Lomb, Inc. v. Barnes-Hind/Hydrocurve, Inc.*, 796 F.2d 443, 448, 230 U.S.P.Q. 416 (Fed. Cir. 1986), *quoting In re Wesslau*, 353 F.2d 238, 241, 147 U.S.P.Q. 391, 393 (C.C.P.A. 1965).

Thus, the combination of Niece and Harris does not teach or suggest all of the elements of Claim 1, and for that reason, cannot support a *prima facie* conclusion of obviousness. Applicant, therefore, respectfully requests reconsideration and withdrawal of the rejection.

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Rejection Under 35 U.S.C. §103(a) Over Niece and Harris in Further View of Heroy

Claims 6 and 10 stand rejected under 35 U.S.C. §103(a) as unpatentable over Niece and Harris as applied in the rejections addressed above, and further in view of Heroy (U.S. Pat. No. 3,669,278).

Without conceding the correctness of the rejection, or waiving any other arguments he may have, Applicant submits that Claim 1 as amended is patentable over the combination of Niece and Harris, as discussed above. If Claim 1 is patentable over Niece and Harris, it follows that the remaining claims, being narrower in scope, are also patentable over Niece and Harris. Heroy does not teach or suggest the elements and structure missing from Niece and Harris. Applicant, therefore, respectfully requests reconsideration and withdrawal of the rejection.

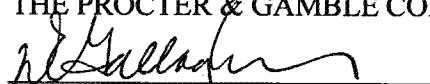
Conclusion

This response represents an earnest effort to place the present application in proper form for allowance. In view of the foregoing, entry of the amendments presented herein, reconsideration of this application, and allowance of the pending claims are respectfully requested.

Respectfully submitted,

THE PROCTER & GAMBLE COMPANY

By



William E. Gallagher
Registration No. 35,145
(513) 983-2522

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